IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 603.

DONALD J. MACFARLANE,

Petitioner,

vs.

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
A CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF OF PETITIONER.

The house confinement clause in health and accident policies is generally held to be an expression for the necessary state of illness to allow recovery. It is not a clause prescribing a course of conduct for the insured.

Aetna Life Insurance Company v. *Willetts,* 282 Fed. 26.

In view of the varying circumstances under which the question arises as to the meaning of the phrase, "Confined within the house," it is not the general language of an opinion construing such clause that controls, but it is the tests employed by the courts determining whether house confinement exists that is determinative.

The issue in the *Reeves Case,* 170 Wis. 370, was whether one who had been ill with a pleurisy condition had so far recovered or improved so that he was able to get out onto the porch of his house was confined within the house. The Wisconsin court held he was no longer so confined.

The issue in the *Buske Case,* 200 Wis. 18, was whether a mental patient at a mental hospital who had the liberty of the grounds was confined within the house. The Wisconsin Court held she was not so confined and that *the distinguishing feature between a confining and a non-confining illness was the physical incapacity to leave the house resulting directly from the illness.*

In both Wisconsin cases, the insured had the physical ability to leave the house.

In the instant case, the trial court found that *"plaintiff is permanently, physically disabled in that both of his legs are paralyzed, he cannot move about or out of his house without the help of others, or without artificial aids,* and would be confined to his house if such assistance were not available. (Tr. 66-67, Finding number 12.)

Consequently, plaintiff does not have that physical ability or physical capacity to leave the house, as stated in the *Buske Case,* 200 Wis. 18, and should be considered house confined.

It must be borne in mind that there has been no recovery or improvement in petitioner's condition, which distinguishes the instant case from the *Reeves Case.*

Our courts have long recognized that the same words in different settings may well have different meanings. So as Justice Holmes wrote in *Towne* v. *Eisner,* 245 U. S. 418, 425,

"A word is not a crystal, transparent and un-

changed, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

The same type of thought is indicated in *Jones* v. *Holland Furnace Company*, 188 Wis. 394, at page 399, where the Supreme Court of Wisconsin said:

> "In an early leading case, which has often been cited and quoted, but never overruled, the ambiguity or uncertainty related to the word 'team.' In the opinion of Chief Justice Dixon, it was said:
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> > " 'The word "team", as used in the contract, is of doubtful signification. It may mean horses, mules, or oxen, and two, four, six, or even more of either kind of beasts. We look upon the contract and cannot say what it is. And yet we know very well that the parties had some definite purpose in using the word. The trouble is not that the word is insensible and has no settled meaning, but that it at the same time admits of several interpretations, according to the subject matter in contemplation at the time. It is an uncertainty, arising from the indefinite and equivocal meaning of the word, when an interpretation is attempted without the aid of surrounding circumstances. It appears on the face of the instrument, and is in reality a patent ambiguity. * * *' *Ganson* v. *Madigan*, 15 Wis. 144."

So as to the phrase "confined within the house." It would thus seem that the court of appeals erred in not determining that the phrase "confined within the house" was ambiguous under the Wisconsin cases, as applied to the specific facts involved, and that a liberal construction of the policy ought to have been given as required by the Wisconsin cases.

Suppose under the policy involved here, there is a diabetic who has had amputations of his legs, and perhaps of

his arms, but who can be wheeled out in a wheel chair, or carried outside the four walls of his house in a basket, is he house confined under the test expressed by the *Buske Case?* He certainly has a physical inability to get outside the four walls of the house, yet being carried out of the house, he is no longer within the four walls of the house.

The literal application of the general language of the *Reeves Case* as argued by respondent in the case at bar, would hold that he was not house confined. Yet such person has the same lack of power of locomotion as plaintiff in the instant case.

In *Mutual Health and Accident Association* v. *Bowman,* 99 Fed. (2) 856 (Certiorari Denied, 306 U. S. 637) the Supreme Court on the strength of *Erie Railroad* v. *Tompkins,* had previously granted certiorari and vacated the previous judgment and remanded the case for re-determination "limited to the question of the right to recover under the law of New Mexico."

The provision of the policy relied on by defendant to exempt it from liability was "this policy does not cover death, disability or other loss received because of or while participating in aeronautics. * * *"

Defendant relied upon the decision of the New Mexico Court in *Sneddon* v. *Massachusetts Protective Association,* 39 N. M. 74, 39 Pac. (2) 1023, where recovery was denied when the insured was a casual invited passenger in the plane. The policy in the *Sneddon Case* excluded participation in aviation and aeronautics.

The Eighth Circuit authorizing recovery for the insured stated that under the rule of *stare decisis* the language and general expressions in an opinion should be limited to the particular facts and issues involved, and must be construed in light of the issues presented and considered. They should not be extended beyond that for any purpose

or authority to another or different case. To be binding as a precedent there must have been an application of the judicial mind to the precise question to be determined in order to fix the rights of the parties.

The court then discussed the meaning of the word "aeronautics" and the word "participating," and concluded that the word "participating" is ambiguous as having a double meaning, and that in the cited case there was no issue as to the meaning of that term and affirmed a recovery for the plaintiff.

As we have pointed out in our original brief, in *Vinograd* v. *Travelers Protective Association,* 217 Wis. 316, involving an accident policy, the Wisconsin Court definitely limited the application of the language from one opinion involving one set of facts, and held that a similar policy applied to a different set of facts, properly should have been given a liberal construction, contrary to the previous adjudication.

In *Order of United Commercial Travelers* v. *Sevier,* 121 Fed. (2) 650, a policy provided for payment should death result from bodily injury effected solely from external violent and accidental means and independent of all other causes, but that the association should not be liable for any death by infection whether caused by accidental means or not unless the infection be introduced into the body through an open wound, which open wound must be caused by external violent and accidental means, and be visible to the unaided eye. The insured, in avoiding an accident in his car, struck a concrete drain and overturned. Abdominal pains developed and a ruptured intestine existed. The court in authorizing recovery stated that the contract being one of a Benefit Society, organized under Ohio law, should be construed according to Ohio decisions, and the *courts of Ohio, not having construed the particular provisions*

in question, as applied to the particular facts presented, must exercise its own judgment in the construction of the policy, and the court went on to state at page 654 in the opinion:

> *"A contract may or may not be ambiguous, uncertain or obscure, dependent upon the proven facts."* (Emphasis supplied.)

Here the contract does not require the wound through which the infection entered to be on the exterior of the body. There must be physical evidence of its existence, and there was physical evidence of the existence of the wound visible to the naked eye after surgery had been performed.

The physical ability of locomotion existed in both the *Reeves* and *Buske Cases.* That ability is not present in the instant case. That distinction makes inapplicable the general language of those two cases, construing similar policies and leaves available only the naked test of house confinement, as expressed in the *Buske Case, i. e. "the physical incapacity to leave the house, resulting directly from the sickness."* Consequently it follows that there having been no precise determination of this exact question before the Wisconsin Court, the determination of the *Vinograd Case* declining to apply the language of one opinion to a different set of facts, is particularly appropriate to the instant case. A liberal construction of the policy is clearly authorized under the Wisconsin cases cited in our original brief.

The phrase "confined within the house" is a kind of generic term designed and conceived to measure the extent of disease, affecting the human species, and to furnish a relatively simple measurement or test for determining liability.

Obviously, being designed to be all inclusive as a test,

it is appropriate for many ailments and as to them the language "confined within the house" may well be unambiguous. Thus in cases of heart ailments and pneumonia and many others, when the insured has so far recovered that he is physically able to get outside the house, he no longer can be held to be "house confined". But in that class of ailments, characterized by paralysis of the legs, from which there has been no recovery or improvement, or in those cases where amputation of the legs has become necessary and the insured can get out of the house only by being pushed in a wheel chair, carried or rolled out, it is submitted that the phrase then becomes ambiguous.

Furthermore, it is to be noted that the house confinement phrase is modified by the word "necessarily". "Necessarily" means of necessity. "Necessity" means "unavoidableness" "fate" or "doom" or "inevitableness". It would appear that one who has had his legs amputated or one who is paralyzed in his legs so there is no power of locomotion is inevitably and necessarily house confined. The question of whether one whose legs are paralyzed so that he can only get out of the house only by means of artificial aids has not been specifically passed on by the Wisconsin courts. The great weight of authority, where the question has been determined, allows recovery. Under the circumstances, disclosed in the instant case, it appears that the *Reeves* and *Buske Cases* which rejected a liberal construction of similar policies are not authoritative upon the construction of this policy when it is applied to the circumstances which render the language contained in the policy ambiguous. Consequently, the general language of the *Buske* and *Reeves Cases,* construing similar policies, cannot be authoritative on the precise question involved here but the specific test expressed therein is applicable. *The physical inability to get out of the house distinguishes a confining from a non-confining illness.*

The language of the *Reeves Case* relied on by respondent, and quoted by the Wisconsin Court in the *Buske Case,* page 10 respondent's brief, and referred to in the opinion of the Court of Appeals, is but descriptive of the limits of the house confinement phrase, and shows that the intention of the policy was to limit the insured's movements to the four walls of the house. He is restricted in his normal movements to the four walls of the house. *The body of the insured must have the ability, unaided, to get outside of the house before he becomes no longer house confined.*

In the instant case, the court found that petitioner could not move about or get out of the house without artificial aids. If the test of house confinement under the *Buske Case* is not the physical power of the body of the insured, unaided by artificial aids, or other assistance, to get outside the house, the house confinement clause is meaningless, for one whose legs and arms have been amputated could be carried out of the four walls in a basket and no longer could be house confined. It is submitted that under the *Reeves* and *Buske Cases* an insured is no longer house confined when his ailing body has so far recovered that by his own power, without artificial aids, he is able to get outside the four walls of the house. *The fact that an insured is outside the four walls of his house becomes important only when it is shown how he got there, not the fact alone that he was outside.*

The Court of Appeals in its opinion failed to give proper consideration to this question, the matter of how the insured got outside the house. The language of the *Buske Case* so indicating was not considered, *i. e.,* "the confinement referred to is plainly confinement induced by the character and degree of sickness, *a physical incapacity to leave the house,* resulting directly from the sickness."

Buske v. *Federal Casualty Company,* 200 Wis. 18: "the

physical capacity to walk about outside, distinguishes a non-confining illness from a confining illness", opinion of Trial Court in *Buske* v. *Federal Casualty Co.*, 200 Wis. 18, Vol. 1702, Wisconsin Cases & Briefs Case No. 7. Thus it would appear that where the insured is able to walk out of his house under his own power and without aids, an insured is not "House Confined". But where the insured can only leave his house by means of a wheel chair or other artificial aid because of amputated or paralyzed limbs, it would appear that the insured does not have the physical capacity or bodily power or ability to leave the house as is required under the *Buske Case,* and is therefore "house confined".

The policy further contains language descriptions of the house confinement clause "House Confinement—Lifetime Income". It is submitted that if the instant case is not a case for "Litetime Income" and liability under the policy, under what circumstances could an insured ever recover a lifetime income under such a policy?

Under the *Buske Case,* as interpreted by respondent, and the Wisconsin Court, a mental patient cannot recover, for his confinement is to the grounds and he is physically able to get outside the house. In the case at bar, petitioner is either carried out or wheeled out in his wheel chair, or by artificial aids, braces, crutches, etc., gets outside the house, but without them he is physically unable to move, as the Court found, and he is held not to be house confined. If the policy means anything, and is not a fraud, it should be given a liberal construction as required by the Wisconsin cases. It is submitted that the Court of Appeals erroneously concluded that it was bound by the general language of the *Buske* and *Reeves Cases,* which were premised on a rejection of a liberal construction of a similar policy. Here it is submitted ambiguity exists and a liberal construction is required. Likewise, did the Court of Appeals,

in its opinion, neglect to give consideration to the test which is expressed in the *Buske Case,* for house confinement, *i. e.,* the physical incapacity to leave the house resulting directly from the sickness.

The benefit which *Erie Railroad* v. *Tompkins,* 304 U. S. 64, sought to obtain was the uniformity of decision between state and federal courts.

To require, however, the lower federal court to be blindly bound to follow the local decisions construing similar policies of insurance, and which opinions rejected the liberal construction, clearly required in the instant case because of ambiguity, while at the same time the state court is free to adopt a liberal construction of such a policy, where required, as shown in the *Vinograd* case, is needlessly to hamper the federal courts in the administration of justice and to undo the benefits obtained under the *Erie Railroad* v. *Tompkins* ruling.

It is as much the duty of the federal court under the *Erie Railroad* case to be free to determine an ambiguity and adopt a liberal construction where the state court would so act, as it was for the federal court to follow the applicable local doctrines expressed in *Guaranty Trust Co.* v. *York,* 326 U. S. 99.

It is submitted that the writ should issue.

Respectfully submitted,

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